

1985

## The Big Chill: Applicability of Section 548(a)(2) of the Bankruptcy Code to Noncollusive Foreclosure Sales

Darcy Lopez

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Darcy Lopez, *The Big Chill: Applicability of Section 548(a)(2) of the Bankruptcy Code to Noncollusive Foreclosure Sales*, 53 Fordham L. Rev. 813 (1985).

Available at: <https://ir.lawnet.fordham.edu/flr/vol53/iss4/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

## NOTES

### THE BIG CHILL: APPLICABILITY OF SECTION 548(a)(2) OF THE BANKRUPTCY CODE TO NONCOLLUSIVE FORECLOSURE SALES

#### INTRODUCTION

The United States Bankruptcy Code<sup>1</sup> grants the trustee in bankruptcy<sup>2</sup> the power to avoid certain transactions involving a debtor who has filed a bankruptcy petition.<sup>3</sup> The purpose of these avoiding powers is to prevent an unequal distribution of the debtor's assets via transactions that are not in the best interest of all the creditors.<sup>4</sup> One such power is contained in section 548(a)(2),<sup>5</sup> a constructive fraud provision that allows the trustee in bankruptcy to avoid a fraudulent transfer of a debtor's interest in property occurring within one year prior to the filing of a petition of bankruptcy.<sup>6</sup> A transfer is deemed fraudulent under section 548(a)(2) if, in exchange, the debtor receives less than a reasonably equivalent value and is insolvent on the date of such transfer or is rendered insolvent as a result of such transfer.<sup>7</sup>

---

1. 11 U.S.C. §§ 101-151, 326 (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333 (to be codified in scattered sections of 11 U.S.C.).

2. The bankruptcy trustee is either appointed by the court or elected by the debtor's unsecured creditors and is charged with the duty of managing the bankrupt's estate. See 11 U.S.C. §§ 701-702, 704 (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 701-702, 704, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 380-81 (to be codified at 11 U.S.C. §§ 701-702, 704).

3. Note, *Mortgage Foreclosure as Fraudulent Conveyance: Is Judicial Foreclosure an Answer to the Durrett Problem?*, 1984 Wis. L. Rev. 195, 215 [hereinafter cited as *Answer to the Durrett Problem*]; see 11 U.S.C. §§ 544-545, 547-549, 724(a) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 544-545, 547-549, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 377-79 (to be codified at 11 U.S.C. §§ 544-545, 547-549).

4. *Answer to the Durrett Problem*, *supra* note 3, at 215; see H.R. Rep. No. 595, 95th Cong., 2d Sess. 177-78, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6138-39; 3 Collier on Bankruptcy ¶ 60.01 (L. King & J. Moore 14th ed. 1977).

5. 11 U.S.C. § 548(a)(2) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(a)(2), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 378-79 (to be codified at 11 U.S.C. § 548(a)(2)).

6. *Id.*; see, e.g., *First Fed. Sav. & Loan Ass'n v. Hulm*, 738 F.2d 323, 325 (8th Cir.), cert. denied, 105 S. Ct. 398 (1984); *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1198-99 (9th Cir.), cert. denied, 105 S. Ct. 125 (1984); *DeMusis v. Carr*, 40 Bankr. 1007, 1008 (D. Conn. 1984); *Strauser v. Veterans Admin.*, 40 Bankr. 868, 869 (Bankr. N.D. Ohio 1984); *New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc.*, 40 Bankr. 701, 702 (Bankr. E.D. Pa. 1984).

7. 11 U.S.C. § 548(a)(2) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(a)(2), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 378-79 (to be codified at 11 U.S.C. § 548(a)(2)); see, e.g., *First Fed. Sav. & Loan Ass'n v. Hulm*, 738 F.2d 323, 325 (8th Cir.), cert. denied, 105 S. Ct. 398 (1984); *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1198-99 (9th Cir.), cert. denied, 105 S. Ct. 125 (1984); *DeMusis v. Carr*, 40 Bankr. 1007, 1008 (D. Conn. 1984); *Strauser v. Veterans Admin.*, 40 Bankr. 868, 869 (Bankr. N.D. Ohio 1984); *New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc.*, 40 Bankr. 701, 702 (Bankr. E.D. Pa. 1984).

Courts are divided on the applicability of section 548(a)(2) to noncollusive<sup>8</sup> mortgage<sup>9</sup> or deed of trust<sup>10</sup> foreclosure sales.<sup>11</sup> The controversy centers on two issues: first, whether a transfer occurs during foreclosure proceedings and second, how to measure reasonably equivalent value in the context of a foreclosure sale. Although the majority of courts addressing these issues has found that a transfer for purposes of section 548(a)(2) occurs during foreclosure proceedings,<sup>12</sup> there has been no con-

---

8. Collusive foreclosure sales would arguably be avoidable under § 548(a)(1) of the Bankruptcy Code, which contemplates transfers made by a debtor with fraudulent intent. See 11 U.S.C. § 548(a)(1) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(a)(1), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 378-79 (to be codified at 11 U.S.C. § 548(a)(1)). This Note deals with foreclosure sales involving debtors who do not possess an intent to defraud their creditors.

9. A mortgage is an instrument used as a financing device. Through a mortgage, a debtor-mortgagor transfers an interest in real property to a lender-mortgagee to secure the repayment of a loan. See G. Osborne, G. Nelson & D. Whitman, *Real Estate Finance Law* § 1.1, at 1 (1979); *Answer to the Durrett Problem*, *supra* note 3, at 198-99. States have adopted one of two theories of mortgage law. Under a lien theory, the mortgage represents a lien on the real property whereby the mortgagor retains possession, legal title and equitable title to the property. See G. Osborne, G. Nelson & D. Whitman, *supra*, § 1.5, at 10; *Answer to the Durrett Problem*, *supra* note 3, at 198. Under a title theory, the mortgagee has legal title to the property but the mortgagor is recognized as the owner. See G. Osborne, G. Nelson & D. Whitman, *supra*, § 1.5, at 10; *Answer to the Durrett Problem*, *supra* note 3, at 199.

10. A deed of trust is a mortgage instrument permitted by some states instead of a mortgage; it conveys the security interest to a trustee who has the power to sell the property pursuant to a power of sale clause upon the debtor's default. See G. Osborne, G. Nelson & D. Whitman, *supra* note 9, § 1.6, at 11-12; Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. Cal. L. Rev. 843, 847 (1980); *Answer to the Durrett Problem*, *supra* note 3, at 201-02.

11. Through a foreclosure sale, a secured lender (mortgagee) is enabled to recover the debt owed to it by executing on its security interest in real property created by the mortgage instrument. See Washburn, *supra* note 10, at 844-47; *Answer to the Durrett Problem*, *supra* note 3, at 199-201. The sale is triggered by the debtor's default in repayment of a loan and may take several forms depending upon the type of mortgage instrument involved and the law of the jurisdiction. See Washburn, *supra* note 10, at 847; *Answer to the Durrett Problem*, *supra* note 3, at 199-205. A foreclosure sale may be judicial or nonjudicial. See G. Osborne, G. Nelson & D. Whitman, *supra* note 9, § 7.9, at 442; Washburn, *supra* note 10, at 846; *Answer to the Durrett Problem*, *supra* note 3, at 205. A judicial sale is conducted by an officer of the court at a public auction. See Washburn, *supra* note 10, at 847; *Answer to the Durrett Problem*, *supra* note 3, at 205. A nonjudicial sale is conducted by either a public official, the mortgagee or trustee under a deed of trust, see G. Osborne, G. Nelson & D. Whitman, *supra* note 9, § 7.9, at 442-43; Washburn, *supra* note 10, at 846-47; *Answer to the Durrett Problem*, *supra* note 3, at 201-02, and may be either a private sale or public auction, see Washburn, *supra* note 10, at 847.

12. See *First Fed. Sav. & Loan Ass'n v. Hulm*, 738 F.2d 323, 326-27 (8th Cir.) (transfer occurred at some time during the foreclosure process), *cert. denied*, 105 S. Ct. 398 (1984); *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547, 549 (5th Cir. 1981) (*per curiam*) (transfer occurred on the foreclosure sale date), *cert. denied*, 454 U.S. 1164 (1982); *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 204 (5th Cir. 1980) (transfer was final on the date of the foreclosure sale); *Lakeview Inv. Group v. Pemberton*, 40 Bankr. 449, 452 (Bankr. E.D.N.C. 1984) (foreclosure sale constituted a transfer of an interest in property of the debtor); *New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc.*, 40 Bankr. 701, 706 (Bankr. E.D. Pa. 1984) (transfer occurred at the time of

sensus on the measure of reasonably equivalent value.<sup>13</sup>

foreclosure); Carr v. DeMusis, 34 Bankr. 653, 654, 656 (Bankr. D. Conn. 1983) (transfer occurred on the sale date), *aff'd on other grounds*, 40 Bankr. 1007 (D. Conn. 1984); Rosner v. Worcester, 28 Bankr. 910, 914 (Bankr. C.D. Cal. 1983) (nonjudicial foreclosure sale is a transfer); Federal Nat'l Mortgage Ass'n v. Wheeler, 34 Bankr. 818, 820 (Bankr. N.D. Ala. 1983) (same); Gillman v. Preston Family Inv. Co. (*In re Richardson*), 23 Bankr. 434, 445-46 (Bankr. D. Utah 1982) (transfer occurred by means of a foreclosure sale); Perdido Bay Country Club Estates, Inc. v. Equitable Trust Co., 23 Bankr. 36, 39 (Bankr. S.D. Fla. 1982) (transfer occurred pursuant to a foreclosure sale); Cooper v. Smith, 24 Bankr. 19, 23 (Bankr. W.D.N.C. 1982) (transfer occurred after a 10-day statutory redemption period following a foreclosure sale); see also Home Life Ins. Co. v. Jones, 20 Bankr. 988, 994 (Bankr. E.D. Pa. 1982) (no court interpreting § 548(a)(2) has "distinguished between a foreclosure sale and any other kind of transfer"). But see Madrid v. Lawyers Title Ins. Corp., 725 F.2d 1197, 1202 (9th Cir.) ("a foreclosure sale is not a transfer by a debtor"), *aff'd on other grounds* 21 Bankr. 424 (Bankr. 9th Cir. 1982), *cert. denied*, 105 S. Ct. 125 (1984); William v. Travelers Ins. Co., 39 Bankr. 989, 991 (D. Minn. 1984) (§548(a)(2) was not intended to apply to noncollusive foreclosure sales); Strauser v. Veterans Admin., 40 Bankr. 868, 871 (Bankr. N.D. Ohio 1984) (foreclosure sale does not involve a transfer); Alsop v. Alaska, 14 Bankr. 982, 986 (Bankr. D. Alaska 1981) (transfer did not occur during state foreclosure proceedings), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982).

13. See First Fed. Sav. & Loan Ass'n v. Hulm, 738 F.2d 323, 327 (8th Cir.) (reasonably equivalent value cannot be determined without an evidentiary hearing), *cert. denied*, 105 S. Ct. 398 (1984); Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201, 203 (5th Cir. 1980) (57.7% of the fair market value on the foreclosure sale date is not reasonably equivalent value); Strauser v. Veterans Admin., 40 Bankr. 868, 870 (Bankr. N.D. Ohio 1984) (reasonably equivalent value should be conclusively presumed at regularly conducted noncollusive foreclosure sales); *In re Marble*, 40 Bankr. 751, 753 (Bankr. W.D. Tex. 1984) (reasonably equivalent value is not received when no value is received for the debtor's equity); New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc., 40 Bankr. 701, 701, 706-07 (Bankr. E.D. Pa. 1984) (reasonably equivalent value is received when the purchase price plus the value of the remaining encumbrance exceeds the fair market value of the property); United Penn Bank v. Dudley, 38 Bankr. 666, 670 (Bankr. M.D. Pa. 1984) (reasonably equivalent value is received when the value given in exchange for the transfer almost equals the full amount of the fair market value); Frank v. Berlin, 39 Bankr. 166, 177 (Bankr. E.D.N.Y. 1984) (reasonably equivalent value is not received when the debtor received far less than equivalent value under any reasonable method of calculation); Carr v. DeMusis, 34 Bankr. 653, 656-57 (Bankr. D. Conn. 1983) (reasonably equivalent value is not received when the purchase price is 31% of the debtor's equity in the property), *aff'd*, 40 Bankr. 1007 (D. Conn. 1984); Rosner v. Worcester, 28 Bankr. 910, 915 (Bankr. C.D. Cal. 1983) (reasonably equivalent value is not received when the foreclosure sale was not regularly conducted and the price received was grossly inadequate so as to make it voidable under state law); Federal Nat'l Mortgage Ass'n v. Wheeler, 34 Bankr. 818, 821 (Bankr. N.D. Ala. 1983) (reasonably equivalent value is not received in exchange for the transfer when the sale price is less than 70% of the fair market value of the property on the sale date); Gillman v. Preston Family Inv. Co. (*In re Richardson*), 23 Bankr. 434, 448 (Bankr. D. Utah 1982) (reasonably equivalent value depends on the facts of each case); Perdido Bay Country Club Estates, Inc. v. Equitable Trust Co., 23 Bankr. 36, 39 (Bankr. S.D. Fla. 1982) (a purchase price of less than 57.7% of the property's fair market value on the sale date is not reasonably equivalent value); Coleman v. Home Sav. Ass'n, 21 Bankr. 832, 834 (Bankr. S.D. Tex. 1982) (reasonably equivalent value is not received when the purchase price is less than 70% of the fair market value of the debtor's equity on the sale date); Smith v. American Consumer Fin. Corp., 21 Bankr. 345, 351 (Bankr. M.D. Fla. 1982) (reasonably equivalent value is not received when the purchase price is a mere fraction of the fair market value on the sale date); Cooper v. Smith, 24 Bankr. 19, 23 (Bankr. W.D.N.C. 1982) (reasonably equivalent value must be determined by considering all the facts and circumstances of the case);

This Note examines these issues<sup>14</sup> in terms of the literal interpretation of section 548(a)(2), the legislative intent behind its enactment and the policy underlying the Bankruptcy Code. Part I establishes that state foreclosure proceedings involve two types of transfers within the scope of section 548(a)(2). Part II examines section 548(d)(1) of the Code, which mandates the time at which a transfer occurs for purposes of section 548(a)(2). It concludes that a transfer does occur in the course of foreclosure proceedings. Part III discusses three possible approaches to measuring reasonably equivalent value at foreclosure sales and advocates a case-by-case analysis.

## I. FORECLOSURE SALES AS TRANSFERS

### A. Nature of the Transfer

Section 101 of the Bankruptcy Code<sup>15</sup> contains a broad definition of the term "transfer" that applies throughout the Code.<sup>16</sup> It is well settled that a foreclosure sale involves a transfer under section 101(41) of the Code.<sup>17</sup> This section has been amended by the 1984 amendments to the

*Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424, 426-27 (Bankr. 9th Cir. 1982) (reasonably equivalent value equals that obtained at a regularly conducted public foreclosure sale), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Madrid*, 21 Bankr. at 428 (Volinn J., dissenting) (majority affords the consideration received at a noncollusive foreclosure sale a conclusive presumption of reasonableness); *Home Life Ins. Co. v. Jones*, 20 Bankr. 988, 994 (Bankr. E.D. Pa. 1982) (reasonably equivalent value is not received when the purchase price is one-third to one-half of the fair market value on the sale date); *Wickham v. United Am. Bank (In re Thompson)*, 18 Bankr. 67, 70 (Bankr. E.D. Tenn. 1982) (as a general rule, reasonably equivalent value is not received when the purchase price is less than 70% of the fair market value of the property on the sale date).

14. This Note will not address the question whether a debtor's personal property used as collateral to secure a debt and sold pursuant to the debtor's default in repayment of the debt is subject to avoidance under § 548(a)(2). For a discussion of this issue, see Calairo v. Pittsburgh Nat'l Bank (*In re Ewing*), 36 Bankr. 476 (W.D. Pa. 1984); Zinman, Houle & Weiss, *Fraudulent Transfers According to Alden, Gross and Borowitz: A Tale of Two Circuits*, 39 Bus. Law. 977, 1015 (1984).

15. 11 U.S.C. § 101(41) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 101(48), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 364, 366, 368 (to be codified at 11 U.S.C. § 101(48)).

16. See 4 Collier on Bankruptcy ¶ 548.01[2] (L. King 15th ed. 1979); Cook, *Fraudulent Transfer Liability Under The Bankruptcy Code*, 17 Hous. L. Rev. 263, 266-67 (1980).

17. Alden, Gross & Borowitz, *Real Property Foreclosure as a Fraudulent Conveyance: Proposals for Solving the Durrett Problem*, 38 Bus. Law. 1605, 1608 (1983); see *First Fed. Sav. & Loan Ass'n v. Hulm*, 738 F.2d 323, 326 (8th Cir.), *cert. denied*, 105 S. Ct. 398 (1984); *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1201 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547, 548-49 (5th Cir. 1981) (per curiam), *cert. denied*, 454 U.S. 1164 (1982); *Lakeview Inv. Group v. Pemberton*, 40 Bankr. 449, 452 (Bankr. E.D.N.C. 1984); *New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc.*, 40 Bankr. 701, 702-06 (Bankr. E.D. Pa. 1984); *Rosner v. Worcester*, 28 Bankr. 910, 914 (Bankr. C.D. Cal. 1983); *Alsop v. Alaska*, 14 Bankr. 982, 985-86 (Bankr. D. Alaska 1981), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982); Note, *Regularly Conducted Non-collusive Mortgage Foreclosure Sales: Inapplicability of Section 548(a)(2) of The Bankruptcy Code*, 52 Fordham L. Rev. 261, 264 (1983) [hereinafter cited as *Inapplicability of Section 548(a)(2)*]. But see Zinman, Houle & Weiss, *supra*

Bankruptcy Code<sup>18</sup> and its substance is contained in section 101(48) of the Code, which provides:

"transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest *and foreclosure of the debtor's equity of redemption*[.]<sup>19</sup>

For purposes of section 548(a)(2), courts have found either or both of two different section 101 transfers to occur during foreclosure proceedings:<sup>20</sup> transfer of the debtor's possessory interest<sup>21</sup> or transfer of the debtor's equity interest.<sup>22</sup>

---

note 14, at 995-98 (Congress defined transfer broadly in § 101(41) so as to achieve uniformity among the various Code sections dealing with transfers rather than to bring non-collusive foreclosure sales within the scope of the fraudulent conveyance provision).

18. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333 (to be codified in scattered sections of 11 U.S.C.).

19. 11 U.S.C. § 101(41) (1982), *as amended* by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 101(48), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 364, 366, 368 (to be codified at 11 U.S.C. § 101(48)) (1984 amendment indicated in italics).

In an off-the-floor colloquy between Senators Dole and DeConcini after the 1984 bankruptcy amendments were passed, Senator Dole stated that this amendment was not intended to subject foreclosure sales to avoidance under § 548(a)(2). Senator Dole reasoned that hearings on the issue were not held prior to the amendment's enactment and whether a foreclosure sale constitutes a § 101 transfer was not an issue in controversy. See 130 Cong. Rec. S13,771-72 (daily ed. Oct. 5, 1984) (remarks of Sen. Dole). The occurrence of this colloquy after the amendment was passed appears to be in response to lobbyists' efforts and does not express the intent of Congress. See Alden, Gross & Borowitz, *The 'Durrett' Controversy and Foreclosure Sales*, N.Y.L.J., Nov. 14, 1984, at 36, col. 2.

20. Whether one or both of these transfers occurs depends upon the type of foreclosure proceedings adopted by a state. For a discussion of the various foreclosure proceedings, see *supra* notes 9-11.

21. See *First Fed. Sav. & Loan Ass'n v. Hulm*, 738 F.2d 323, 326 (8th Cir.), *cert. denied*, 105 S. Ct. 398 (1984); *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547, 548-49 (5th Cir. 1981) (*per curiam*), *cert. denied*, 454 U.S. 1164 (1982); *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 204 (5th Cir. 1980).

Transfer of possession of the debtor's property during foreclosure proceedings is effected by the execution and delivery of the property deed to the purchaser at the foreclosure sale. See *Durrett*, 621 F.2d at 203-04.

22. See *First Fed. Sav. & Loan Ass'n v. Hulm*, 738 F.2d 323, 326 (8th Cir.), *cert. denied*, 105 S. Ct. 398 (1984); *New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc.*, 40 Bankr. 701, 706 (Bankr. E.D. Pa. 1984); *Rosner v. Worcester*, 28 Bankr. 910, 914 (Bankr. C.D. Cal. 1983); *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 445 (Bankr. D. Utah 1982); *Cooper v. Smith*, 24 Bankr. 19, 23 (Bankr. W.D.N.C. 1982).

The debtor's equity interest is traditionally known as his equity of redemption. See Simpson, *Real Property Foreclosures: The Fallacy of Durrett*, 19 Real Prop. Prob. J. 73, 78 (1984). The common law equity of redemption right exists from the time of the debtor's default to the foreclosure sale and allows the debtor to cure the default. See G. Osborne, G. Nelson & D. Whitman, *supra* note 9, § 7.1, at 425; Washburn, *supra* note 10, at 929. The majority of states statutorily recognize a redemption right of the debtor for a specified period after a foreclosure sale. See G. Osborne, G. Nelson & D. Whitman, *supra* note 9, § 7.1, at 425-26, § 8.4, at 536-37; Washburn, *supra* note 10, at 930; *Answer to the*

It had been asserted that the application of the section 101 definition of transfer is limited under section 548(a)(2), which contemplates only voluntary transfers by the debtor.<sup>23</sup> Accordingly, because a foreclosure sale involves an involuntary transfer, it would not be subject to avoidance under section 548(a)(2).<sup>24</sup> This view, however, is no longer plausible in light of the 1984 amendment to section 548(a)(2):

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor *voluntarily or involuntarily*— . . .

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such trans-

---

Durrett Problem, *supra* note 3, at 202 & n.43. Instead of curing the default, the debtor can protect his equity interest in the property by paying the sale price plus costs. See G. Osborne, G. Nelson & D. Whitman, *supra*, note 9, § 7.1, at 425, § 7.3, at 428; Washburn, *supra* note 10, at 930; *Answer to the Durrett Problem*, *supra* note 3, at 202, 205 & n.64. A transfer of the debtor's equity interest will occur upon the lapse of a state's redemption period.

23. See *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1203 (9th Cir.) (Farris, J., concurring), *cert. denied*, 105 S. Ct. 125 (1984); *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547, 549 (5th Cir. 1981) (Clark, J., dissenting from per curiam decision), *cert. denied*, 454 U.S. 1164 (1982); *Strauser v. Veterans Admin.*, 40 Bankr. 868, 871 (Bankr. N.D. Ohio 1984); *Zinman, Houle & Weiss*, *supra* note 14, at 996-98. But see *First Fed. Sav. & Loan Ass'n v. Hulm*, 738 F.2d 323, 326 (8th Cir.) ("Section 101(41) expressly includes involuntary transfers, and neither section 101(41) nor section 548(a) indicates that to fall within their terms the transfer had to be made by [the debtor] himself."), *cert. denied*, 105 S. Ct. 398 (1984); *Lakeview Inv. Group v. Pemberton*, 40 Bankr. 449, 451 (Bankr. E.D.N.C. 1984) (section 548(a) refers to a transfer of a debtor's interest in property and not to a transfer by the debtor); *New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc.*, 40 Bankr. 701, 706 (Bankr. E.D. Pa. 1984) (interpretation of section 548(a) to require a voluntary transfer by a debtor is an "erroneous construction of slightly inartful statutory language"); *Frank v. Berlin*, 39 Bankr. 166, 169 (Bankr. E.D.N.Y. 1984) (forced sales "are to be construed as having been made by the debtor"); *Rosner v. Worcester*, 28 Bankr. 910, 914 (Bankr. C.D. Cal. 1983) (definition of transfer is "sufficiently broad to include the disposition of the debtor's equity in property at a nonjudicial foreclosure sale"); *Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424, 427-28 (Bankr. 9th Cir. 1982) (Volinn, J., dissenting) ("Code definition of 'transfer' includes involuntary transfer[s]" and thus includes foreclosure sales.), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Answer to the Durrett Problem*, *supra* note 3, at 222 (definition of transfer includes "a transfer effected by a mortgage foreclosure sale").

Section 67(d) of the Bankruptcy Act, the predecessor of § 548(a)(2) of the Bankruptcy Code, contemplated transfers made by a debtor, whereas § 548(a)(2) contemplates "transfer[s] of an interest of the debtor." Compare Bankruptcy Act of 1938, ch. 575, § 67d(2), 52 Stat. 840, 877 with Bankruptcy Code of 1978, 11 U.S.C. § 548(a)(2) (1982) (amended 1984). Both voluntary and involuntary transfers therefore would seem to have been included under § 548(a)(2).

24. See *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1203 (9th Cir.) (Farris, J., concurring), *cert. denied*, 105 S. Ct. 125 (1984); *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547, 549 (5th Cir. 1981) (Clark, J., dissenting from per curiam decision), *cert. denied*, 454 U.S. 1164 (1982); *Strauser v. Veterans Admin.*, 40 Bankr. 868, 871 (Bankr. N.D. Ohio 1984); *Zinman, Houle & Weiss*, *supra* note 14, at 996-98.

fer or obligation . . . .<sup>25</sup>

Although one senator has indicated that the amendment was not intended to take a position on whether noncollusive foreclosure sales are subject to avoidance under section 548(a)(2),<sup>26</sup> courts must literally interpret the amended section. A transfer for purposes of section 548(a)(2), therefore, may be effected either voluntarily or involuntarily, and thus includes noncollusive foreclosure sales. The 1984 amendments, however, do not resolve the question whether a transfer occurs during foreclosure proceedings.<sup>27</sup> A controversy remains over the interpretation of section 548(d)(1),<sup>28</sup> a provision designed to determine the time at which a section 101 transfer occurs for purposes of section 548(a).<sup>29</sup>

### B. Legislative Intent

Despite the inclusion of foreclosure sales within the ambit of section 548(a)(2) under a literal interpretation, it has been contended that the intent of Congress is to the contrary.<sup>30</sup> The legislative history of section 548(a)(2), however, is silent on the question whether Congress intended foreclosure sales to be avoidable transfers.<sup>31</sup> This history dates back to an English fraudulent conveyance statute,<sup>32</sup> the Statute of 13 Elizabeth,<sup>33</sup>

---

25. 11 U.S.C. § 548(a)(2) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(a)(2), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 378-79 (to be codified at 11 U.S.C. § 548(a)(2)) (1984 amendment indicated in italics).

26. See 130 Cong. Rec. S13,771-72 (daily ed. Oct. 5, 1984) (remarks of Sen. Dole). See *supra* note 19.

27. See *id.* (The amendment to § 548(a) is "consistent with the majority holding in Madrid."). Madrid v. Lawyers Title Ins. Corp., 725 F.2d 1197 (9th Cir.), cert. denied, 105 S. Ct. 125 (1984), created a split in the circuits by holding that a transfer does not occur during foreclosure proceedings. *Id.* at 1199.

28. 11 U.S.C. § 548(d)(1) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(d)(1), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 379 (to be codified at 11 U.S.C. § 548(d)(1)).

29. See *infra* note 85 and accompanying text.

30. See Madrid v. Lawyers Title Ins. Corp., 725 F.2d 1197, 1200 (9th Cir.), cert. denied, 105 S. Ct. 125 (1984); William v. Travelers Ins. Co., 39 Bankr. 989, 991 (D. Minn. 1984); Zinman, Houle & Weiss, *supra* note 14, at 986-95; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 264-71.

31. Lawyers Title Ins. Corp. v. Madrid, 21 Bankr. 424, 428 (Bankr. 9th Cir. 1982) (Volinn, J., dissenting), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), cert. denied, 105 S. Ct. 125 (1984); *Answer to the Durrett Problem*, *supra* note 3, at 221-22; see Note, *Nonjudicial Foreclosure Under Deed of Trust May be a Fraudulent Transfer of Bankrupt's Property*, 47 Mo. L. Rev. 345, 348-49 & n.33 (1982) [hereinafter cited as *Nonjudicial Foreclosure*]. For a discussion of legislative history, see *infra* notes 32-47 and accompanying text.

32. Weintraub & Resnick, *Indirect Economic Benefit as Fair Consideration in Fraudulent Conveyance Cases*, 15 U.C.C. L.J. 75, 75 (1982); Zinman, Houle & Weiss, *supra* note 14, at 988; Note, *Good Faith and Fraudulent Conveyances*, 97 Harv. L. Rev. 495, 495 (1983) [hereinafter cited as *Good Faith*]; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 264-65.

33. Statute of Fraudulent Conveyances, 1570, 13 Eliz., ch. 5, quoted in A. Elkus & G. Glenn, *A Treatise on Secret Liens and Reputed Ownership* 179-80 (1910).



which was designed to protect creditors from debtors who conveyed property with an intent to defraud.<sup>34</sup> A conveyance could be avoided only if the debtor was found to possess the requisite intent.<sup>35</sup> Congress adopted the language of the Statute of 13 Elizabeth as a fraudulent conveyance provision in the early bankruptcy laws.<sup>36</sup> In 1918 the National Conference of Commissioners on Uniform State Laws approved the Uniform Fraudulent Conveyance Act (UFCA),<sup>37</sup> also based on the Statute of 13 Elizabeth.<sup>38</sup> In addition to an actual fraud provision,<sup>39</sup> the UFCA introduced a constructive fraud provision<sup>40</sup> so that courts would not have to invoke extra-statutory presumptions—"badges of fraud"<sup>41</sup>—in order to find fraudulent intent.<sup>42</sup> The Chandler Act of 1938,<sup>43</sup> later referred to as the Bankruptcy Act of 1938,<sup>44</sup> modeled its fraudulent conveyance provision largely on that found in the UFCA.<sup>45</sup> The Bankruptcy Code of 1978 adopted a similar constructive fraud provision<sup>46</sup>—section 548(a)(2).<sup>47</sup>

Some commentators have asserted that section 548(a)(2) should be interpreted in the same way as the UFCA provision,<sup>48</sup> which arguably was not intended to invalidate noncollusive foreclosure sales.<sup>49</sup> Legislative

---

34. Alden, Gross & Borowitz, *supra* note 17, at 1605; Zinman, Houle & Weiss, *supra* note 14, at 988; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 265.

35. See 4 Collier on Bankruptcy ¶ 548.02 (L. King 15th ed. 1979); G. Glenn, *The Rights and Remedies of Creditors Respecting Their Debtor's Property* ¶ 68, at 54 (1915); Zinman, Houle & Weiss, *supra* note 14, at 988.

36. Zinman, Houle & Weiss, *supra* note 14, at 989; see Bankruptcy Act of July 1, 1898, ch. 541, § 67e, 30 Stat. 544, 564-65, amended by Chandler Act of 1938, ch. 575, § 67d, 52 Stat. 840, 877-78 (repealed 1978); Bankrupt Act of March 2, 1867, ch. 176, § 35, 14 Stat. 517, 534 (repealed 1878); Bankrupt Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440, 440-42 (repealed 1843); Bankrupt Act of Apr. 4, 1800, ch. 19, § 1, 2 Stat. 19, 19-21 (repealed 1803).

37. Unif. Fraudulent Conveyance Act (UFCA), 7A U.L.A. 161-366 (1918).

38. Zinman, Houle & Weiss, *supra* note 14, at 989-90; *Good Faith*, *supra* note 32, at 496-97 & n.8; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 265-66.

39. Unif. Fraudulent Conveyance Act § 7, 7A U.L.A. 242 (1918). 11 U.S.C. § 548(a)(1) is an actual fraud provision adopted by the Bankruptcy Code. See 4 Collier on Bankruptcy ¶ 548.02 (L. King 15th ed. 1979).

40. Unif. Fraudulent Conveyance Act § 4, 7A U.L.A. 205 (1918).

41. See G. Glenn, *supra* note 35, §§ 146-147, at 116-17; 1 D. Moore, *A Treatise on Fraudulent Conveyances and Creditors' Remedies at Law and in Equity* 222-24 (1908); Zinman, Houle & Weiss, *supra* note 14, at 989.

42. Zinman, Houle & Weiss, *supra* note 14, at 990-91; *Good Faith*, *supra* note 32, at 497; see *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 266.

43. Ch. 575, 52 Stat. 840 (superseded by 11 U.S.C. §§ 101-15, 1326 (1982)).

44. Zinman, Houle & Weiss, *supra* note 14, at 991.

45. *Id.*; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 267.

46. See Zinman, Houle & Weiss, *supra* note 14, at 992; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 269.

47. 11 U.S.C. § 548(a)(2) (1982).

48. Zinman, Houle & Weiss, *supra* note 14, at 992-95; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 269-71.

49. Zinman, Houle & Weiss, *supra* note 14, at 992-95; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 265-70.

The National Conference of Commissioners on Uniform State Laws approved the Uni-

intent, however, indicates that the two provisions are not necessarily to be interpreted in the same manner.<sup>50</sup> Moreover, to do so would ignore the fundamentally different goals of the UFCA and the Bankruptcy Code. The purpose of a fraudulent conveyance law is only to make certain that some creditor reaches the debtor's assets,<sup>51</sup> whereas the purpose of the bankruptcy law is to allocate the debtor's assets among his creditors.<sup>52</sup> In addition, the definition of transfer in the Bankruptcy Code is broader than the definition of conveyance in the UFCA.<sup>53</sup>

The legislative history of section 548(a)(2) does not express an intent to exclude foreclosure sales from its purview.<sup>54</sup> That no case prior to *Durrett v. Washington National Insurance Co.*<sup>55</sup> avoided a foreclosure sale under section 548(a)(2),<sup>56</sup> therefore, cannot be attributed to an exclusionary intent on the part of the legislature. An examination of the evolution of the statutory language of section 548(a)(2), however, may provide an explanation. Although there was nothing in the language of the constructive fraud provision adopted by the Chandler Act from the UFCA to suggest that it should not be applied to foreclosure sales, that provision did contain a good faith requirement for determining whether fair consideration had been received.<sup>57</sup> Fair consideration was received in exchange for a transfer only if the parties acted in good faith.<sup>58</sup> A court's consideration of the parties' good faith made unlikely a finding

---

form Fraudulent Transfer Act (UFTA) on August 22, 1984. Unif. Fraudulent Transfer Act (1984) (available in files of *Fordham Law Review*). The UFTA is a revised version of the UFCA. Unif. Fraudulent Transfer Act, Commissioners' Prefatory Note (1984) (available in files of *Fordham Law Review*). It creates a presumption of reasonably equivalent value in regularly conducted, noncollusive foreclosure sales. Unif. Fraudulent Transfer Act § 3(b) (1984) (available in files of *Fordham Law Review*).

50. 4 Collier on Bankruptcy ¶ 548.01 (L. King 15th ed. 1979).

51. Good Faith, *supra* note 32, at 502; see 2 G. Glenn, Mortgages, Deeds of Trust, and Other Security Devices as to Land § 234, at 1111-12 (1943); 1 D. Moore, *supra* note 41, § 3, at 5-6, § 8, at 11-12, § 12, at 16.

52. 3 Collier on Bankruptcy ¶ 60.01 (L. King & J. Moore 14th ed. 1977); *Good Faith*, *supra* note 32, at 502-03; see 2 D. Moore, *supra* note 41, at 1069.

53. 4 Collier on Bankruptcy ¶ 548.01 (L. King 15th ed. 1979); Cook, *supra* note 16, at 267; Zinman, Houle & Weiss, *supra* note 14, at 983; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 267.

The definition of conveyance in the UFCA does not expressly include involuntary acts by the debtor. See Unif. Fraudulent Conveyance Act § 1, 7A U.L.A. 164 (1918). The definition of transfer in the UFTA, however, includes both voluntary and involuntary dispositions. Unif. Fraudulent Transfer Act § 1(12) (1984) (available in files of *Fordham Law Review*).

54. See *supra* notes 31-47 and accompanying text.

55. 621 F.2d 201, 204 (5th Cir. 1980).

56. *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547, 550 (5th Cir. 1981) (Clark, J., dissenting from per curiam decision), *cert. denied*, 454 U.S. 1164 (1982); *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 448 (Bankr. D. Utah 1982); Zinman, Houle & Weiss, *supra* note 14, at 977; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 261-62; *Nonjudicial Foreclosure*, *supra* note 31, at 346.

57. See Chandler Act of 1938, ch. 575, § 67d(1)(e), 52 Stat. 840, 877 (superseded by 11 U.S.C. § 548(a)(2) (1982)).

58. See *id.*

that fair consideration had not been received in a regularly conducted noncollusive foreclosure sale. The Bankruptcy Code, however, eliminated the good faith requirement in its determination of reasonably equivalent value<sup>59</sup> and, therefore, the likelihood that a court would avoid a foreclosure sale under section 548(a)(2) has increased.

### C. Policy Considerations

It has been asserted that policy considerations dictate that foreclosure sales should not be avoided under section 548(a)(2) as fraudulent transfers.<sup>60</sup> A major policy concern is that such avoidance may chill bidding at foreclosure sales<sup>61</sup> because of the possibility that the transfer may later be avoided.<sup>62</sup> In reality, however, the secured lender (mortgagee) is the purchaser at ninety-nine percent of public foreclosure sales and is usually the only bidder.<sup>63</sup> When there are no third-party bidders, the mortgagee

---

59. Carr v. DeMuis, 34 Bankr. 653, 656 n.1 (Bankr. D. Conn. 1983), *aff'd*, 40 Bankr. 1007 (D. Conn. 1984); Gillman v. Preston Family Inv. Co. (*In re Richardson*), 23 Bankr. 434, 447 (Bankr. D. Utah 1982); Cook, *supra* note 16, at 277; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 276; see 11 U.S.C. § 548(a)(2) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(a)(2), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 378-79 (to be codified at 11 U.S.C. § 548(a)(2) (1982)).

Similarly, the UFTA does not prescribe good faith as a criterion for establishing reasonably equivalent value, unlike the UFCA, which includes good faith in its definition of fair consideration. Compare Unif. Fraudulent Transfer Act § 3 (1984) (available in files of *Fordham Law Review*) with Unif. Fraudulent Conveyance Act § 3, 7A U.L.A. 181 (1918).

60. See Madrid v. Lawyers Title Ins. Corp., 725 F.2d 1197, 1202 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547, 550 (5th Cir. 1981) (Clark, J., dissenting from per curiam decision), *cert. denied*, 454 U.S. 1164 (1982); Alsop v. Alaska, 14 Bankr. 982, 987 (Bankr. D. Alaska 1981), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982); Zinman, Houle & Weiss, *supra* note 14, at 982-83, 1013-17; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 278-80. But see First Fed. Sav. & Loan Ass'n v. Hulm, 738 F.2d 323, 327 (8th Cir.) ("policy considerations cannot affect the outcome in this case"), *cert. denied*, 105 S. Ct. 398 (1984); New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc., 40 Bankr. 701, 706 (Bankr. E.D. Pa. 1984) (policy considerations "are insufficient justification for judicial evisceration of § 548"); Gillman v. Preston Family Inv. Co. (*In re Richardson*), 23 Bankr. 434, 448 (Bankr. D. Utah 1982) (policy arguments against the enforcement of an avoiding power are irrelevant).

61. See Madrid v. Lawyers Title Ins. Corp., 725 F.2d 1197, 1202 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547, 550 (5th Cir. 1981) (Clark, J., dissenting from per curiam decision), *cert. denied*, 454 U.S. 1164 (1982); Alsop v. Alaska, 14 Bankr. 982, 987 (Bankr. D. Alaska 1981), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982); Zinman, Houle & Weiss, *supra* note 14, at 1013; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 278; *Nonjudicial Foreclosure*, *supra* note 31, at 351.

62. See Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547, 550 (5th Cir. 1981) (Clark, J., dissenting from per curiam decision), *cert. denied*, 454 U.S. 1164 (1982); Alsop v. Alaska, 14 Bankr. 982, 987 (Bankr. D. Alaska 1981), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982); Zinman, Houle & Weiss, *supra* note 14, at 1013.

63. Answer to the Durrett Problem, *supra* note 3, at 211.

In the majority of cases deciding this issue, the mortgagee was the purchaser at the foreclosure sale. See First Fed. Sav. & Loan Ass'n v. Hulm, 738 F.2d 323, 325 (8th Cir.) (mortgagee was the purchaser at a judicial foreclosure sale), *cert. denied*, 105 S. Ct. 398

must bid in order to protect its interest in the property.<sup>64</sup> The price paid for the property is usually no more than the value of the lien foreclosed upon plus foreclosure sale costs.<sup>65</sup> The mortgagee has no incentive to

(1984); *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547, 548 (5th Cir. 1981) (per curiam) (secured lender was the purchaser at a nonjudicial foreclosure sale), *cert. denied*, 454 U.S. 1164 (1982); *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 202-03 (5th Cir. 1980) (third party was the purchaser at a nonjudicial, public foreclosure sale); *William v. Travelers Ins. Co.*, 39 Bankr. 989, 989 (D. Minn. 1984) (mortgagee was the purchaser at a nonjudicial foreclosure sale); *Strauser v. Veterans Admin.*, 40 Bankr. 868, 869 (Bankr. N.D. Ohio 1984) (mortgagee was the purchaser at a judicial, public foreclosure sale); *In re Marble*, 40 Bankr. 751, 751-52 (Bankr. W.D. Tex. 1984) (secured lender was the purchaser at a nonjudicial foreclosure sale); *Lakeview Inv. Group v. Pemberton*, 40 Bankr. 449, 450 (Bankr. E.D.N.C. 1984) (mortgagee was the purchaser at a nonjudicial, public foreclosure sale); *New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc.*, 40 Bankr. 701, 702 (Bankr. E.D. Pa. 1984) (mortgagee was the purchaser at a nonjudicial, public foreclosure sale); *United Penn Bank v. Dudley*, 38 Bankr. 666, 667 (Bankr. M.D. Pa. 1984) (mortgagee was the purchaser at a judicial foreclosure sale); *Carr v. DeMusis*, 34 Bankr. 653, 654 (Bankr. D. Conn. 1983) (mortgagee was the purchaser at a judicial, strict foreclosure sale), *aff'd*, 40 Bankr. 1007 (D. Conn. 1984); *Rosner v. Worcester*, 28 Bankr. 910, 912 (Bankr. C.D. Cal. 1983) (third party was the purchaser at a nonjudicial foreclosure sale); *Federal Nat'l Mortgage Ass'n v. Wheeler*, 34 Bankr. 818, 820 (Bankr. N.D. Ala. 1983) (mortgagee was the purchaser at a nonjudicial foreclosure sale); *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 437-38 (Bankr. D. Utah 1982) (third party was the purchaser at a nonjudicial, public foreclosure sale); *Perdido Bay Country Club Estates, Inc. v. Equitable Trust Co.*, 23 Bankr. 36, 39 (Bankr. S.D. Fla. 1982) (mortgagee was the purchaser at a foreclosure sale); *Coleman v. Home Sav. Ass'n*, 21 Bankr. 832, 833 (Bankr. S.D. Tex. 1982) (mortgagee was the purchaser at a foreclosure sale); *Smith v. American Consumer Fin. Corp.*, 21 Bankr. 345, 347 (Bankr. M.D. Fla. 1982) (third party was the purchaser at a judicial foreclosure sale); *Cooper v. Smith*, 24 Bankr. 19, 21 (Bankr. W.D.N.C. 1982) (secured lender was the purchaser at a nonjudicial foreclosure sale); *Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424, 425 (Bankr. 9th Cir. 1982) (third party was the purchaser at a nonjudicial, public foreclosure sale), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Home Life Ins. Co. v. Jones*, 20 Bankr. 988, 989 (Bankr. E.D. Pa. 1982) (mortgagee's attorney was the purchaser at a judicial foreclosure sale); *Wickham v. United Am. Bank (In re Thompson)*, 18 Bankr. 67, 68 (Bankr. E.D. Tenn. 1982) (third party was the purchaser at a foreclosure sale); *Alsop v. Alaska*, 14 Bankr. 982, 984 (Bankr. D. Alaska 1981) (mortgagee was the sole bidder and purchaser at a nonjudicial foreclosure sale), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982).

64. *Washburn*, *supra* note 10, at 848-49; *Answer to the Durrett Problem*, *supra* note 3, at 225; see *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 446 (Bankr. D. Utah 1982).

65. See *First Fed. Sav. & Loan Ass'n v. Hulm*, 738 F.2d 323, 325 (8th Cir.), *cert. denied*, 105 S. Ct. 398 (1984); *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547, 548 (5th Cir. 1981) (per curiam), *cert. denied*, 454 U.S. 1164 (1982); *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203 (5th Cir. 1980); *William v. Travelers Ins. Co.*, 39 Bankr. 989, 989 (D. Minn. 1984); *Strauser v. Veterans Admin.*, 40 Bankr. 868, 869 (Bankr. N.D. Ohio 1984); *In re Marble*, 40 Bankr. 751, 752 (Bankr. W.D. Tex. 1984); *New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc.*, 40 Bankr. 701, 702 (E.D. Pa. 1984); *Carr v. DeMusis*, 34 Bankr. 653, 654 (Bankr. D. Conn. 1983), *aff'd*, 40 Bankr. 1007 (D. Conn. 1984); *Federal Nat'l Mortgage Ass'n v. Wheeler*, 34 Bankr. 818, 820 (Bankr. N.D. Ala. 1983); *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 438 (Bankr. D. Utah 1982); *Coleman v. Home Sav. Ass'n*, 21 Bankr. 832, 833 (Bankr. S.D. Tex. 1982); *Smith v. American Consumer Fin. Corp.*, 21 Bankr. 345, 347 (Bankr. M.D. Fla. 1982); *Cooper v. Smith*, 24 Bankr. 19, 21 (Bankr. W.D.N.C. 1982); *Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424, 425 (Bankr. 9th Cir. 1982),

bid a higher price because it will receive title to the property regardless of the amount bid and the purchase price will be used to satisfy its lien.<sup>66</sup> The mortgagee may then realize a windfall if it sells the property at fair market value.<sup>67</sup> The real chill, therefore, is not on bidding, which is virtually nonexistent, but rather on the profit that the mortgagee would realize as a result of this subsequent sale. Subjecting foreclosure sales to avoidance under section 548(a)(2) allows unsecured creditors to share in this profit and thus furthers the policy of the Bankruptcy Code favoring equitable distribution of a debtor's assets among his creditors.<sup>68</sup> In addition, it is conceivable that in a case in which the mortgagee pays less than the value of the lien for the property, a deficiency judgment will be sought against the debtor by the mortgagee to recover the remaining balance of the debt.<sup>69</sup> In this case, additional assets that should be distributed among the creditors may wind up in the lender's pocket.

A second concern is that creditors will be less willing to lend on the security of a mortgage or deed of trust,<sup>70</sup> and the cost of borrowing will increase,<sup>71</sup> due to the risk imposed by subjecting noncollusive foreclosure sales to avoidance under section 548(a)(2). This risk is that a foreclosure sale occurring within one year before the debtor files a bankruptcy petition may later be avoided by the trustee in bankruptcy.<sup>72</sup> The mortgagee, however, will not necessarily lose its security interest: If the court finds the mortgagee to be in good faith, it will grant the mortgagee a creditor's lien on the property during the bankruptcy proceedings equal in value to the outstanding debt.<sup>73</sup> In addition, because section 548(a)(2) requires

---

*aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Home Life Ins. Co. v. Jones*, 20 Bankr. 988, 993 (Bankr. E.D. Pa. 1982); *Alsop v. Alaska*, 14 Bankr. 982, 984 (Bankr. D. Alaska 1981), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982).

66. Washburn, *supra* note 10, at 849; *Answer to the Durrett Problem*, *supra* note 3, at 211-12.

67. See *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 446 n.18 (Bankr. D. Utah 1982); Washburn, *supra* note 10, at 849, 889; *Answer to the Durrett Problem*, *supra* note 3, at 212.

68. *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 447 (Bankr. D. Utah 1982); *Nonjudicial Foreclosure*, *supra* note 31, at 348; *Answer to the Durrett Problem*, *supra* note 3, at 215-16. See *supra* note 52 and accompanying text.

69. See *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 446 n.18 (Bankr. D. Utah 1982); G. Osborne, G. Nelson & D. Whitman, *supra* note 9, § 8.1, at 525; Washburn, *supra* note 10, at 849-50; *Answer to the Durrett Problem*, *supra* note 3, at 207.

70. See *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1202 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Alsop v. Alaska*, 14 Bankr. 982, 987 (Bankr. D. Alaska 1981), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982); Zinman, Houle & Weiss, *supra* note 14, at 1014; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 278-79; *Answer to the Durrett Problem*, *supra* note 3, at 224.

71. See *Alsop v. Alaska*, 14 Bankr. 982, 987 (Bankr. D. Alaska 1981), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982); *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 279-80.

72. See *Nonjudicial Foreclosure*, *supra* note 31, at 350-51.

73. See *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 449 (Bankr. D. Utah 1982); 11 U.S.C. § 548(c) (1982), *as amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(c), 1984 U.S. Code

that the transfer cause the debtor's insolvency or that the debtor be insolvent on the transfer date,<sup>74</sup> a petition for bankruptcy in these cases is filed within a short time after the foreclosure sale, usually within a matter of days.<sup>75</sup> Mortgagees have always lent subject to the possibility that the debtor would file a bankruptcy petition before the foreclosure sale.<sup>76</sup> In this case the Code imposes an automatic stay<sup>77</sup> that postpones the sale

Cong. & Ad. News (98 Stat.) 333, 379 (to be codified at 11 U.S.C. §548(c)); *Nonjudicial Foreclosure*, *supra* note 31, at 351; *Answer to the Durrett Problem*, *supra* note 3, at 224; see also Carr v. DeMusis, 34 Bankr. 653, 657 (Bankr. D. Conn. 1983) (granting a creditor's lien equal in value to outstanding debt), *aff'd*, 40 Bankr. 1007 (D. Conn. 1984); Home Life Ins. Co. v. Jones, 20 Bankr. 988, 995 (Bankr. E.D. Pa. 1982) (same).

74. 11 U.S.C. § 548(a)(2) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(a)(2), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 378-79 (to be codified at 11 U.S.C. § 548(a)(2)).

75. See First Fed. Sav. & Loan Ass'n v. Hulm, 738 F.2d 323, 325 (8th Cir.) (petition was filed 4 mos., 3 wks. and 2 days after the sale), *cert. denied*, 105 S. Ct. 398 (1984); Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547, 548 (5th Cir. 1981) (per curiam) (petition was filed 6 mos., 3 wks. and 1 day after the sale), *cert. denied*, 454 U.S. 1164 (1982); Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201, 202 n.1 (5th Cir. 1980) (petition was filed 9 days after the sale); Strauser v. Veterans Admin., 40 Bankr. 868, 869 (Bankr. N.D. Ohio 1984) (petition was filed 7 mos., 3 wks. and 2 days after the sale); *In re Marble*, 40 Bankr. 751, 752 (Bankr. W.D. Tex. 1984) (petition was filed approximately 45 minutes after the sale); Lakeview Inv. Group v. Pemberton, 40 Bankr. 449, 450 (Bankr. E.D.N.C. 1984) (petition was filed 1 mo., 3 wks. and 5 days after the sale); Carr v. DeMusis, 34 Bankr. 653, 654, 656 (Bankr. D. Conn. 1983) (petition was filed 42 days after the sale), *aff'd*, 40 Bankr. 1007 (D. Conn. 1984); Rosner v. Worcester, 28 Bankr. 910, 912-13 (Bankr. C.D. Cal. 1983) (petition was filed 35 days after the sale); Federal Nat'l Mortgage Ass'n v. Wheeler, 34 Bankr. 818, 820 (Bankr. N.D. Ala. 1983) (petition was filed 23 days after the sale); Gillman v. Preston Family Inv. Co. (*In re Richardson*), 23 Bankr. 434, 438 (Bankr. D. Utah 1982) (petition was filed 1 day after the sale); Coleman v. Home Sav. Ass'n, 21 Bankr. 832, 833 (Bankr. S.D. Tex. 1982) (petition was filed 2 mos., 4 wks. and 1 day after the sale); Smith v. American Consumer Fin. Corp., 21 Bankr. 345, 346-47 (Bankr. M.D. Fla. 1982) (petition was filed 1 mo., 3 wks. and 6 days after the sale); Cooper v. Smith, 24 Bankr. 19, 21-22 (Bankr. W.D.N.C. 1982) (petition was filed 14 days after the sale); Lawyers Title Ins. Corp. v. Madrid, 21 Bankr. 424, 425 (Bankr. 9th Cir. 1982) (petition was filed 7 days after the sale), *aff'd*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); Home Life Ins. Co. v. Jones, 20 Bankr. 988, 989 (Bankr. E.D. Pa. 1982) (petition was filed 4 mos., 2 wks. and 1 day after the sale); Wickham v. United Am. Bank (*In re Thompson*), 18 Bankr. 67, 68 (Bankr. E.D. Tenn. 1982) (petition was filed 1 mo., 4 wks. and 1 day after the sale); Alsop v. Alaska, 14 Bankr. 982, 984 (Bankr. D. Alaska 1981) (petition was filed 2 days after the sale), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982); Alden, Gross & Borowitz, *supra* note 17, at 1619.

76. See *In re Jersey Island Packing Co.*, 138 F. 625, 627 (9th Cir. 1905); Alden, Gross & Borowitz, *supra* note 17, at 1619; *Nonjudicial Foreclosure*, *supra* note 31, at 347; *Answer to the Durrett Problem*, *supra* note 3, at 224.

77. See 11 U.S.C. § 362(a) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 362(a), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 371 (to be codified at 11 U.S.C. § 362(a)); Bankr. R. P. 601; G. Osborne, G. Nelson & D. Whitman, *supra* note 9, § 8.12, at 556; Alden, Gross & Borowitz, *supra* note 17, at 1619; *Nonjudicial Foreclosure*, *supra* note 31, at 347; *Answer to the Durrett Problem*, *supra* note 3, at 224; see also Meyer v. Rowen, 181 F.2d 715, 716 (10th Cir. 1950) (imposing an automatic stay); *In re McCann*, 27 Bankr. 678, 679 (Bankr. S.D. Ohio 1982) (same); Yancy v. Adree Acceptance Co., 23 Bankr. 945, 948-51 (Bankr. E.D. Mich. 1982) (same); Home Life Ins. Co. v. Jones, 20 Bankr. 988, 990-91 (Bankr. E.D. Pa. 1982) (same); Joe DeLisi Fruit Co. v. Minnesota, 11 Bankr. 694, 695-96 (Bankr. D. Minn. 1981) (same).

until the bankruptcy proceedings are completed or the stay is vacated.<sup>78</sup> Subjecting noncollusive foreclosure sales to avoidance under section 548(a)(2) merely extends this risk a few more days.

A third concern is that if the sale is avoided under section 548(a)(2), a mortgagee who is the purchaser at a foreclosure sale may be exposed to liability as a result of reselling the property.<sup>79</sup> Under section 550(a) of the Bankruptcy Code,<sup>80</sup> such a mortgagee who resells the property before the bankruptcy petition is filed will be required to pay the difference between the fair market value of the property on the foreclosure sale date, as determined by the bankruptcy court, and the price it paid for the property at the foreclosure sale.<sup>81</sup> A mortgagee who resells the property prior to the filing of the bankruptcy petition will be penalized if the bankruptcy court values the property in excess of the resale price.<sup>82</sup> However, because the bankruptcy petition is usually filed a short time after the foreclosure sale,<sup>83</sup> the mortgagee is timely alerted that the sale may be avoided by the trustee in bankruptcy. Any subsequent sale of the property will thus be made with such notice.

A court should not justify its decision to exclude foreclosure sales from the purview of section 548(a)(2) on policy grounds alone,<sup>84</sup> which in any event do not weigh as heavily in favor of exclusion as some commentators have suggested.<sup>85</sup> Because the legislative history is silent,<sup>86</sup> the language of section 548(a)(2) and the overall purpose of the Bankruptcy

---

78. See 11 U.S.C. § 362(c)-(g) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 362(c)-(g), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 371 (to be codified at 11 U.S.C. § 362(c)-(g)); Bankr. R. P. 601; G. Osborne, G. Nelson & D. Whitman, *supra* note 9, § 8.11, at 555; *Answer to the Durrett Problem*, *supra* note 3, at 215; see also Yancy v. Adree Acceptance Co., 23 Bankr. 945, 948 (Bankr. E.D. Mich. 1982) (staying foreclosure sale).

79. See Zinman, Houle & Weiss, *supra* note 14, at 982-83; *Nonjudicial Foreclosure*, *supra* note 31, at 351; *Answer to the Durrett Problem*, *supra* note 3, at 225.

80. 11 U.S.C. § 550(a) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 550(a), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 379 (to be codified at 11 U.S.C. § 550(a)).

81. See *id.*; Zinman, Houle & Weiss, *supra* note 14, at 982; *Answer to the Durrett Problem*, *supra* note 3, at 226.

82. If the mortgagee is in good faith, it will receive a lien on the property in the amount of improvements made after the transfer less any profit realized as a result of the subsequent sale or the increase in value of the property attributable to such improvements. 11 U.S.C. § 550(d) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 550(d), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 379-80 (to be codified at 11 U.S.C. § 550(d)); see Zinman, Houle & Weiss, *supra* note 14, at 1014.

83. See *supra* note 75 and accompanying text.

84. First Fed. Sav. & Loan Ass'n v. Hulm, 738 F.2d 323, 327 (8th Cir.), *cert. denied*, 105 S. Ct. 398 (1984); New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc., 40 Bankr. 701, 706 (Bankr. E.D. Pa. 1984); Gillman v. Preston Family Inv. Co. (*In re Richardson*), 23 Bankr. 434, 448 (Bankr. D. Utah 1982); see 2A N. Singer, Sutherland's Statutes and Statutory Construction § 56.01, at 627 (C. Sands rev. 4th ed. 1984).

85. See *supra* notes 61-83 and accompanying text.

86. See *supra* notes 31-54 and accompanying text.

Code,<sup>87</sup> warranting the inclusion of foreclosure sales within the scope of section 548(a)(2), must be examined.<sup>88</sup>

## II. TIME OF THE TRANSFER

Although it is established that a transfer occurs during foreclosure proceedings,<sup>89</sup> the time at which this transfer occurs for purposes of section 548(a)(2) remains to be determined. This is necessary because only transfers occurring within one year prior to the filing of a bankruptcy petition may be subject to avoidance under section 548(a)(2).<sup>90</sup> This determination of time depends on the interpretation of section 548(d)(1).<sup>91</sup> Section 548(d)(1)<sup>92</sup> was not substantively affected by the 1984 amendments. The amended version reads as follows:

For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.<sup>93</sup>

Because of the policy concerns discussed above,<sup>94</sup> some courts have struggled to find that a foreclosure sale cannot be avoided under section 548(a)(2).<sup>95</sup> To rationalize this finding they have held that the transfer occurs on the date of the perfection of the mortgagee's security interest,<sup>96</sup>

---

87. See *supra* note 68 and accompanying text.

88. See N. Singer, *supra* note 84, § 46.01, at 73-74 (if the language of a statute is plain, the courts must enforce the statute according to its terms), § 46.05, at 90-91 (each section of a statute should be construed in accordance with the statute's general purpose), § 48.01, at 278 (when the legislative history of a statute is ambiguous, a court must use "intrinsic" aids to interpret it), § 56.02, at 629 (a statute should be interpreted in accordance with its purpose).

89. See *supra* notes 16-88 and accompanying text.

90. See 11 U.S.C. § 548(a)(2) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(a)(2), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 378-79 (to be codified at 11 U.S.C. § 548(a)(2)).

91. See *First Fed. Sav. & Loan Ass'n v. Hulm*, 738 F.2d 323, 327 (8th Cir.), *cert. denied*, 105 S. Ct. 398 (1984); *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1200-01 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Alsop v. Alaska*, 14 Bankr. 982, 986 (Bankr. D. Alaska 1981), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982); 4 *Collier on Bankruptcy* ¶ 548.02 (L. King 15th ed. 1979); Cook, *supra* note 16, at 269 & n.28.

92. 11 U.S.C. § 548(d)(1) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(d)(1), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 379 (to be codified at 11 U.S.C. § 548(d)(1)).

93. *Id.*

94. See *supra* notes 60-83 and accompanying text.

95. See *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1199-1203 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Alsop v. Alaska*, 14 Bankr. 982, 986-88 (Bankr. D. Alaska 1981), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982).

96. See *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1200-01 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Alsop v. Alaska*, 14 Bankr. 982, 986-88 (Bankr. D. Alaska 1981), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982).



which in most cases is not within one year prior to the filing of the bankruptcy petition.<sup>97</sup> These courts have reached this conclusion through their interpretation of section 548(d)(1).<sup>98</sup> Under state law a bona fide purchaser of the property, purchasing after the perfection date of the security interest and before the foreclosure sale, could not acquire an interest in the property superior to that of the purchaser at the foreclosure sale.<sup>99</sup>

If the language of section 548(d)(1) is interpreted in light of its purpose and the policy of the Bankruptcy Code, however, it is evident that the transfer occurs in the course of the foreclosure proceedings and does not relate back to the date of the perfection of the mortgagee's security interest. The intent of Congress in enacting section 548(d)(1) was to give the trustee in bankruptcy the power to avoid secret transfers of the debtor's interest.<sup>100</sup> Because secret transfers were unperfected,<sup>101</sup> a bona fide pur-

---

97. See *First Fed. Sav. & Loan Ass'n v. Hulm*, 738 F.2d 323, 326 (8th Cir.) (mortgagee's security interest was perfected more than one year prior to the filing of the bankruptcy petition), *cert. denied*, 105 S. Ct. 398 (1984); *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547, 548 (5th Cir. 1981) (per curiam) (same), *cert. denied*, 454 U.S. 1164 (1982); *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 202 n.1, 204 (5th Cir. 1980) (same); *Strauser v. Veterans Admin.*, 40 Bankr. 868, 871 (Bankr. N.D. Ohio 1984) (same); *Lakeview Inv. Group v. Pemberton*, 40 Bankr. 449, 450 (Bankr. E.D.N.C. 1984) (same); *Rosner v. Worcester*, 28 Bankr. 910, 911, 913 (Bankr. C.D. Cal. 1983) (same); *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 437-38 (Bankr. D. Utah 1982) (same); *Coleman v. Home Sav. Ass'n*, 21 Bankr. 832, 833 (Bankr. S.D. Tex. 1982) (same); *Smith v. American Consumer Fin. Corp.*, 21 Bankr. 345, 346-47 (Bankr. M.D. Fla. 1982) (same); *Cooper v. Smith*, 24 Bankr. 19, 20-21 (Bankr. W.D.N.C. 1982) (same); *Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424, 425-26 (Bankr. 9th Cir. 1982) (same), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Home Life Ins. Co. v. Jones*, 20 Bankr. 988, 989 (Bankr. E.D. Pa. 1982) (same); *Wickham v. United Am. Bank (In re Thompson)*, 18 Bankr. 67, 68 (Bankr. E.D. Tenn. 1982) (same); *Alsop v. Alaska*, 14 Bankr. 982, 984, 986 (Bankr. D. Alaska 1981) (same), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982).

98. See *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1200-03 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Alsop v. Alaska*, 14 Bankr. 982, 986-88 (Bankr. D. Alaska 1981), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982).

99. See *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1199 & n.1 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Alsop v. Alaska*, 14 Bankr. 982, 986 (Bankr. D. Alaska 1981), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982).

100. *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1200 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); 4 *Collier on Bankruptcy* ¶ 548.01[2] (L. King 15th ed. 1979); 3 *Collier on Bankruptcy* ¶¶ 60.37[1]-[4], 60.38 (L. King & J. Moore 14th ed. 1977). In the absence of § 548(d)(1), a transfer could be immune from avoidance if it were kept secret until after the one-year limitation period had lapsed. See 4 *Collier on Bankruptcy* ¶ 548.08 (L. King 15th ed. 1979).

Section 547 of the Bankruptcy Code enables the trustee in bankruptcy to avoid certain transfers of a debtor's property occurring prior to the filing of a bankruptcy petition, which afford preferential treatment to one creditor over others. See 3 *Collier on Bankruptcy* ¶ 60.02[1] (L. King & J. Moore 14th ed. 1977) (discussing § 60 of the Bankruptcy Act, which was redesignated § 547 by the Bankruptcy Code). Sections 547(e) and 548(d)(1) both fix the time at which a transfer occurs based on the time at which such transfer was perfected. Compare 11 U.S.C. § 547(e) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 547(e), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 378 (to be codified at 11 U.S.C. § 547(e))

chaser of property that was the subject of a prior secret transfer could acquire an interest in the property superior to that of the transferee.<sup>102</sup> In this case, section 548(d)(1) would serve to move the date of the secret transfer to the time immediately before the filing of the bankruptcy petition.<sup>103</sup> Accordingly, the one year limitation in section 548(a) could not bar avoidance of a secret transfer.<sup>104</sup> Although the language of section 548(d)(1) suggests that it applies not only to secret transfers but to all transfers scrutinized under section 548,<sup>105</sup> it is a provision designed to subject an unperfected transfer to avoidance by moving the transfer date further ahead in time<sup>106</sup> and not to prevent avoidance by moving the transfer date back in time. In addition, the use of section 548(d)(1) as a vehicle to prevent avoidance of a transfer contravenes the Bankruptcy Code's policy to distribute a debtor's assets equitably among his creditors.<sup>107</sup>

The "relation-back" analysis used to prevent avoidance of foreclosure sales is also inconsistent with the language of section 548(d)(1). The analysis is implicitly premised on either of two misconceptions. First, a court invoking this analysis may disregard the fact that section 101(48) transfers of the debtor's possessory and equity interests in the property occur during foreclosure proceedings.<sup>108</sup> Instead, it scrutinizes under section 548(d)(1) the section 101(48) transfer of the security interest in the property to the mortgagee via the mortgage instrument.<sup>109</sup> Applying section 548(d)(1) in light of this misconception,<sup>110</sup> the transfer of the se-

---

with 11 U.S.C. § 548(d)(1) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(d)(1), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 379 (to be codified at 11 U.S.C. § 548(d)(1)). The legislative intent behind both of these sections is the same. Compare 3 Collier on Bankruptcy ¶ 60.37[1]-[4], 60.38 (L. King & J. Moore 14th ed. 1977) (discussing the intent of § 60 of the Bankruptcy Act) with 4 Collier on Bankruptcy ¶ 548.01[2] (L. King 15th ed. 1979) (discussing the intent of § 548(d)(1) of the Bankruptcy Code).

101. See 4 Collier on Bankruptcy ¶ 548.08 (L. King 15th ed. 1979); 3 Collier on Bankruptcy ¶¶ 60.36-38 (L. King & J. Moore 14th ed. 1977).

102. See 4 Collier on Bankruptcy ¶ 548.08 (L. King 15th ed. 1979); 3 Collier on Bankruptcy ¶ 60.36 (L. King & J. Moore 14th ed. 1977).

103. See 4 Collier on Bankruptcy ¶ 548.08 (L. King 15th ed. 1979).

104. *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1200 (9th Cir.), cert. denied, 105 S. Ct. 125 (1984); 4 Collier on Bankruptcy ¶ 67.40 (L. King & J. Moore 14th ed. 1978).

105. See 3 Collier on Bankruptcy ¶ 60.38 (L. King & J. Moore 14th ed. 1977).

106. See 4 Collier on Bankruptcy ¶ 548.08 (L. King 15th ed. 1979).

107. See *supra* note 52 and accompanying text.

108. It appears that this misconception was employed by the *Madrid* court. In a footnote the court stated: "As we hold that a transfer under § 548(a) does not occur at time of foreclosure, we do not base our holding on the relation back doctrine." *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197, 1199 n.1 (9th Cir.), cert. denied, 105 S. Ct. 125 (1984).

109. *Id.* at 1200 ("[A] transfer occurred when [the mortgagee's] security interest in [the property] was perfected under [state] law.").

110. Some authorities rejecting the "relation-back" analysis believe that it is premised on this misconception. See *First Fed. Sav. & Loan Ass'n v. Hulm*, 738 F.2d 323, 327 (8th Cir.) ("Section 548(d)(1) is in no way inconsistent with our conclusion that separate and

curity interest "is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected [could not] acquire an interest in the property transferred that is superior to the interest in such property of the [mortgagee]"<sup>111</sup> on the date of the perfection of the mortgagee's security interest. The time at which the transfer occurs under this view, therefore, is the date on which the security interest is perfected. This analysis is erroneous because it is the section 101(48) transfer occurring during the foreclosure proceedings that should be scrutinized under section 548(d)(1).<sup>112</sup> As previously established, both the debtor's possessory and equity interests are transferred at some time during state foreclosure proceedings.<sup>113</sup> It is these transfers, not the transfer of the security interest in the property to the mortgagee, that the trustee in bankruptcy seeks to avoid under section 548(a)(2).<sup>114</sup>

Operating under a second misconception, a court invoking the relation-back analysis correctly scrutinizes the section 101(48) transfer of either the debtor's possessory or equity interest under section 548(d)(1),<sup>115</sup> but applies section 548(d)(1) incorrectly. Instead of looking forward from the time of the section 101(48) transfer to determine whether a bona fide purchaser could acquire a superior interest, the court looks back in time.<sup>116</sup> Applying section 548(d)(1) in this way,<sup>117</sup> *before* the date of the transfer of the debtor's possessory or equity interest dur-

---

distinct interests in property may be transferred at different times. It is our view that foreclosure of [a] mortgage . . . effect[s] a transfer of the interest retained by [the debtor] after he granted a mortgage."), *cert. denied*, 105 S. Ct. 398 (1984); *Gillman v. Preston Family Inv. Co.* (*In re Richardson*), 23 Bankr. 434, 445 (Bankr. D. Utah 1982) ("Alsup's interpretation of section 548(d)(1). . . improperly fuses two separate transfers: the transfer to the lender of a lien by means of a deed of trust and the subsequent transfer of the debtor's equity to a purchaser by means of a foreclosure sale."); Alden, Gross & Borowitz, *supra* note 17, at 1609 ("[Alsup's] conclusion that the foreclosure should be deemed to relate back to the time of the granting of the underlying security interest, which itself undeniably constitutes a transfer, makes the 'transfer' of foreclosure a nonevent."). The conclusion in *Alsup*, however, appears to be premised on a second misconception. See *infra* notes 115-16 and accompanying text.

111. 11 U.S.C. § 548(d)(1) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(d)(1), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 379 (to be codified at 11 U.S.C. § 548(d)(1)).

112. See *Gillman v. Preston Family Inv. Co.* (*In re Richardson*), 23 Bankr. 434, 446 (Bankr. D. Utah 1982).

113. See *supra* notes 20-22 and accompanying text.

114. See *Gillman v. Preston Family Inv. Co.* (*In re Richardson*), 23 Bankr. 434, 445-46 (Bankr. D. Utah 1982).

115. It appears that the *Alsup* court operated under this misconception. See *Alsup v. Alaska*, 14 Bankr. 982, 985-86 (Bankr. D. Alaska 1981) ("[I]n Alaska a foreclosure sale passes both title and possession to the purchaser . . . Although the transaction that occurred at the foreclosure sale might, standing alone, satisfy the definition of transfer of §101(40), that definition does not stand alone in § 548. Section 548(d)(1) sets out special rules to determine when a transfer is made for purposes of § 548.") (citations omitted), *aff'd*, 22 Bankr. 1017 (D. Alaska 1982).

116. *Id.* at 986 ("[T]he interest of the purchaser at a foreclosure sale is perfected at the time of the recording of the original deed of trust. . . . Since under Alaska law no purchaser from Plaintiffs subsequent to Plaintiffs' execution of the deed of trust and its recording . . . could have acquired an interest superior to that of the transferee at the

ing the foreclosure proceedings, "a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected [could not] acquire an interest in the property transferred that is superior to the interest in such property of the [purchaser at the foreclosure sale]"<sup>118</sup> after the date of the perfection of the mortgagee's security interest. Accordingly, the date of the perfection of the security interest would be the transfer date under this analysis.

Such an interpretation is erroneous because it is the period after, not before, the section 101(48) transfer to which a court should look in determining the time at which a bona fide purchaser could acquire an interest superior to that of the transferee.<sup>119</sup> This is evident when the interpretation is applied in cases involving transfers other than foreclosure sales. Although in the case of a transfer occurring during foreclosure proceedings a bona fide purchaser before the transfer date could not acquire an interest superior to the transferee's between the date of perfection of the security interest and the section 101(48) transfer date,<sup>120</sup> in cases involving virtually all other section 101(48) transfers a bona fide purchaser prior to the transfer date could have acquired an interest in the property superior to that of the transferee. The time of the transfer under section 548(d)(1) in cases other than foreclosure sales would be "immediately before the date of the filing of the [bankruptcy] petition"<sup>121</sup> if the court were to look to the time before the section 101(48) transfer. The bulk of section 548(d)(1) would thus be rendered meaningless in cases involving transfers other than foreclosure sales. In addition, transfers made prior to one year before the filing of the bankruptcy petition would be deemed under this analysis to have been made immediately before the filing of the bankruptcy petition. Section 548(d)(1) would serve to subject almost all transfers to avoidance under section 548(a)(2) regardless of when the transfer occurred in relation to the filing of the bankruptcy petition. The application of section 548(d)(1), therefore, contemplates bona fide pur-

---

foreclosure sale, pursuant to the provisions of § 548(d)(1) the transfer was made [on the date of perfection].").

117. Some commentators supporting the "relation-back" analysis uphold it on the basis of this misapplication. See Simpson, *supra* note 22, at 78-79; Zinman, Houle & Weiss, *supra* note 14, at 999-1000. Others rejecting the "relation-back" analysis use this misapplication to support a conclusion that a transfer during foreclosure proceedings does not relate back to the date of perfection under § 548(d)(1) when the value of the mortgaged property exceeds the secured debt. See Alden, Gross & Borowitz, *supra* note 17, at 1610-11.

118. 11 U.S.C. § 548(d)(1) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(d)(1), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 379 (to be codified at 11 U.S.C. § 548(d)(1)).

119. See 3 Collier on Bankruptcy ¶¶ 60.36, 60.39, 60.41 (L. King & J. Moore 14th ed. 1977); Cook, *supra* note 16, at 269.

120. See Simpson, *supra* note 22, at 79; Zinman, Houle & Weiss, *supra* note 14, at 999-1000.

121. 11 U.S.C. § 548(d)(1) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(d)(1), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 379 (to be codified at 11 U.S.C. § 548(d)(1)).

chasers existing after the section 101(48) transfer date and can serve only to move the section 101(48) transfer date further ahead in time for purposes of section 548(a)(2).

In a correct application of section 548(d)(1), a court should look to state law to determine whether the transfer is so perfected that a bona fide purchaser from the debtor who purchases the property after the debtor's equity or possessory interest has been transferred during the foreclosure proceedings can acquire an interest superior to that of the foreclosure sale purchaser.<sup>122</sup> If under state law a bona fide purchaser cannot acquire a superior interest, the section 548(d)(1) transfer date is the date during the course of the foreclosure proceedings after which such a superior interest cannot be acquired. If under state law a bona fide purchaser can acquire an interest superior to that of the transferee, the transfer date will be "immediately before the date of the filing of the [bankruptcy] petition."<sup>123</sup>

### III. "REASONABLY EQUIVALENT VALUE" AT A FORECLOSURE SALE

Once it has been determined that a transfer has occurred within one year prior to the filing of the bankruptcy petition and that the debtor is insolvent on the transfer date or has been rendered insolvent by the transfer, the transfer can be avoided under section 548(a)(2) only if a reasonably equivalent value has not been received by the debtor. Courts have taken three different approaches to the question of reasonably equivalent value at a foreclosure sale. The first approach purportedly follows *Durrett v. Washington National Insurance Co.*<sup>124</sup> and asserts that reasonably equivalent value is not received at a foreclosure sale when the purchase price is less than 70% of the fair market value on the sale date.<sup>125</sup> In *Durrett*, the court held that reasonably equivalent value had not been received for property that was sold for 57.7% of its fair market value.<sup>126</sup> It based its holding on the fact that it was unable to find any authority approving a transfer, challenged under section 67(d) of the Bankruptcy Act, in which less than 70% of the property's fair market value on the sale date was received.<sup>127</sup> Many courts deciding this issue

122. See 4 Collier on Bankruptcy ¶¶ 547.48, 548.08 (15th ed. 1979); 3 Collier on Bankruptcy ¶¶ 60.39[2], 60.40 (L. King & J. Moore 14th ed. 1977). For a description of state law concerning perfection of real property transfers, see 4 Collier on Bankruptcy ¶ 547.48 (L. King 15th ed. 1979).

123. 11 U.S.C. § 548(d)(1) (1982), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(d)(1), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 379 (to be codified at 11 U.S.C. § 548(d)(1)).

124. 621 F.2d 201 (5th Cir. 1980).

125. See *Federal Nat'l Mortgage Ass'n v. Wheeler*, 34 Bankr. 818, 821 (Bankr. N.D. Ala. 1983); *Coleman v. Home Sav. Ass'n*, 21 Bankr. 832, 834 (Bankr. S.D. Tex. 1982); *Wickham v. United Am. Bank (In re Thompson)*, 18 Bankr. 67, 70 (Bankr. E.D. Tenn. 1982).

126. *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203 (5th Cir. 1980).

127. *Id.*

have read *Durrett* as establishing a 70% test.<sup>128</sup> This interpretation is erroneous. Because in *Durrett* only 57.7% of the fair market value of the property had been received at the foreclosure sale,<sup>129</sup> *Durrett's* discussion of the 70% figure is dictum.<sup>130</sup> *Durrett* thus at best establishes a Fifth Circuit precedent that a price of 57.7% of the fair market value or less is not reasonably equivalent value in cases in which the facts and circumstances are similar to those in *Durrett*.<sup>131</sup>

A second approach is to presume conclusively that reasonably equivalent value has been received at a foreclosure sale.<sup>132</sup> The justification for this view is that under state law a foreclosure sale could not be set aside due to an inadequacy of price alone.<sup>133</sup> For purposes of section 548(a)(2), however, reasonably equivalent value should not be determined by state law<sup>134</sup> but rather should be a function of the policy underlying the Bankruptcy Code,<sup>135</sup> to distribute a debtor's assets equally among similarly situated creditors.<sup>136</sup> Prices received at foreclosure sales are usually significantly below the fair market value of the property be-

---

128. See *Strauser v. Veterans Admin.*, 40 Bankr. 868, 870 (Bankr. N.D. Ohio 1984); *United Penn Bank v. Dudley*, 38 Bankr. 666, 669-70 (Bankr. M.D. Pa. 1984); *Federal Nat'l Mortgage Ass'n v. Wheeler*, 34 Bankr. 818, 821 (Bankr. N.D. Ala. 1983); *Coleman v. Home Sav. Ass'n*, 21 Bankr. 832, 834 (Bankr. S.D. Tex. 1982); *Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424, 426-27 (Bankr. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Home Life Ins. Co. v. Jones*, 20 Bankr. 988, 993 (Bankr. E.D. Pa. 1982); *Wickham v. United Am. Bank (In re Thompson)*, 18 Bankr. 67, 70 (Bankr. E.D. Tenn. 1982).

129. *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203 (5th Cir. 1980).

130. See *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 448 (Bankr. D. Utah 1982); *Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424, 428 (Bankr. 9th Cir. 1982) (Volinn, J., dissenting), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984).

131. See *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 448 (Bankr. D. Utah 1982); *Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424, 428 (Bankr. 9th Cir. 1982) (Volinn, J., dissenting), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984).

132. See *Strauser v. Veterans Admin.*, 40 Bankr. 868, 870 (Bankr. N.D. Ohio 1984); *Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424, 426-27 (Bankr. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Madrid*, 21 Bankr. at 428 (Volinn, J. dissenting); *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 275. The UFTA has adopted this approach. See *Unif. Fraudulent Transfer Act* § 3(b) (1984) (available in files of *Fordham Law Review*). But see *Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424, 428 (Bankr. 9th Cir. 1982) (Volinn, J., dissenting) (adequacy of consideration must be examined), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984).

133. See *Strauser v. Veterans Admin.*, 40 Bankr. 868, 870 (Bankr. N.D. Ohio 1984); *Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424, 427 (Bankr. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Washburn*, *supra* note 10, at 859; *Answer to the Durrett Problem*, *supra* note 3, at 214; *Inapplicability of Section 548(a)(2)*, *supra* note 17, at 275-76.

134. "[T]here is nothing novel in avoiding transfers under bankruptcy law which are valid under state law." *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 448 (Bankr. D. Utah 1982).

135. See *id.* at 447; 2A N. Singer, *supra* note 84, § 46.05, at 56, § 56.02, at 403.

136. See *Nonjudicial Foreclosure*, *supra* note 31, at 348; *Answer to the Durrett Problem*, *supra* note 3, at 214.

cause the sales are forced, as opposed to arms' length transactions between willing buyers and sellers.<sup>137</sup> Consequently, the debtor loses his equity in the property in almost all cases.<sup>138</sup> He will thus have neither the ability nor the incentive to exercise his equity of redemption right,<sup>139</sup> which ordinarily would serve to preserve his equity interest.<sup>140</sup> Because the debtor is bankrupt, he will probably not have the necessary funds to cure the default himself, and he will not have the incentive to sell the property at fair market value in order to redeem an equity interest that will be lost to him in any event.<sup>141</sup> The debtor's equity in the property, therefore, is not distributed among creditors, but instead is realized by the purchaser at the foreclosure sale.<sup>142</sup> That purchaser in most cases is the mortgagee.<sup>143</sup> Due to this inequity, the receipt of reasonably equivalent value should not be presumed in a foreclosure sale.

A third approach is to examine the facts and circumstances in each case to determine whether reasonably equivalent value has been received at a foreclosure sale.<sup>144</sup> This analysis is the most appropriate<sup>145</sup> because even in establishing a fixed percentage test a court may base its decision in part on equitable circumstances.<sup>146</sup> Also, conflicting or insufficient evidence may make it difficult for a court to ascertain the fair market value of the property.<sup>147</sup> Therefore, reasonably equivalent value should not be a function of fair market value alone. Among the factors that courts

---

137. Washburn, *supra* note 10, at 848.

138. *Id.* at 850; *Answer to the Durrett Problem, supra* note 3, at 211-12.

139. *See Answer to the Durrett Problem, supra* note 3, at 223.

140. For a discussion of the debtor's equity interest, see *supra* note 22.

141. *See Answer to the Durrett Problem, supra* note 3, at 223.

142. *See Washburn, supra* note 10, at 850; *Answer to the Durrett Problem, supra* note 3, at 223.

143. *See supra* note 63 and accompanying text.

144. *See DeMusis v. Carr*, 40 Bankr. 1007, 1009 (D. Conn. 1984) (expressly adopting a case-by-case approach); *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 448 (Bankr. D. Utah 1982) (same); *Cooper v. Smith*, 24 Bankr. 19, 23 (Bankr. W.D.N.C. 1982) (same); *Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424, 428 (Bankr. 9th Cir. 1982) (Volinn, J., dissenting) (advocating a case-by-case approach), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984); *Home Life Ins. Co. v. Jones*, 20 Bankr. 988, 994 n.23 (Bankr. E.D. Pa. 1982) (expressly adopting a case-by-case approach); *see also In re Marble*, 40 Bankr. 751, 753 (Bankr. W.D. Tex. 1984) (implicitly adopting a case-by-case approach); *New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc.*, 40 Bankr. 701, 706-07 (Bankr. E.D. Pa. 1984) (same); *United Penn Bank v. Dudley*, 38 Bankr. 666, 670 (Bankr. M.D. Pa. 1984) (same); *Frank v. Berlin*, 39 Bankr. 166, 176-77 (Bankr. E.D.N.Y. 1984) (same); *Rosner v. Worcester*, 28 Bankr. 910, 915 (Bankr. C.D. Cal. 1983) (same); *Smith v. American Consumer Fin. Corp.*, 21 Bankr. 345, 351 (Bankr. M.D. Fla. 1982) (same).

145. *See 4 Collier on Bankruptcy* ¶ 548.09 (L. King 15th ed. 1979).

146. *See Answer to the Durrett Problem, supra* note 3, at 210.

147. *Id.* at 210-11; *see United Penn Bank v. Dudley*, 38 Bankr. 666, 669-70 (Bankr. M.D. Pa. 1984); *Rosner v. Worcester*, 28 Bankr. 910, 914 (Bankr. C.D. Cal. 1983); *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 441-44 (Bankr. D. Utah 1982); *Home Life Ins. Co. v. Jones*, 20 Bankr. 988, 993 (Bankr. E.D. Pa. 1982); *Wickham v. United Am. Bank (In re Thompson)*, 18 Bankr. 67, 69 (Bankr. E.D. Tenn. 1982).

have considered under the case-by-case approach are the good faith of the purchaser,<sup>148</sup> the relative difference in the amount paid as compared to the fair market value of the property,<sup>149</sup> the percentage of the fair market value represented by the amount paid,<sup>150</sup> the bargaining position

---

148. See *Cooper v. Smith*, 24 Bankr. 19, 23 (Bankr. W.D.N.C. 1982).

Arguably, good faith should not be considered in a case-by-case approach because the Bankruptcy Code of 1978 omitted it as a factor in determining reasonably equivalent value. By contrast, the Bankruptcy Act had expressly included good faith in its definition of fair consideration. Compare Bankruptcy Code of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2600 (codified as amended at 11 U.S.C. § 548(a)(2) (1982)), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 548(a)(2), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 333, 378-79 (to be codified at 11 U.S.C. § 548(a)(2)) with Bankruptcy Act, ch. 575, § 67d(1), 52 Stat. 840, 877 (1938) (superseded by 11 U.S.C. § 548(a)(2) (1982)). See *supra* notes 57-59 and accompanying text.

149. See *Cooper v. Smith*, 24 Bankr. 19, 23 (Bankr. W.D.N.C. 1982).

150. See *In re Marble*, 40 Bankr. 751, 753 (Bankr. W.D. Tex. 1984); *New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc.*, 40 Bankr. 701, 706-07 (Bankr. E.D. Pa. 1984); *United Penn Bank v. Dudley*, 38 Bankr. 666, 670 (Bankr. M.D. Pa. 1984); *Frank v. Berlin*, 39 Bankr. 166, 177 (Bankr. E.D.N.Y. 1984); *Carr v. DeMusis*, 34 Bankr. 653, 656 (Bankr. D. Conn. 1983), *aff'd*, 40 Bankr. 1007 (D. Conn. 1984); *Rosner v. Worcester*, 28 Bankr. 910, 914-15 (Bankr. C.D. Cal. 1983); *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 441 & n.11 (Bankr. D. Utah 1982); *Smith v. American Consumer Fin. Corp.*, 21 Bankr. 345, 351-52 (Bankr. M.D. Fla. 1982); *Cooper v. Smith*, 24 Bankr. 19, 23 (Bankr. W.D.N.C. 1982); *Home Life Ins. Co. v. Jones*, 20 Bankr. 988, 993-94 & n.23 (Bankr. E.D. Pa. 1982).

Because the purchaser at a foreclosure sale will assume liability for any encumbrances remaining on the property after the sale, a court should subtract the value of post-sale liens on the property from the fair market value before comparing the fair market value to the sale price. Some courts have performed this computation. See *Carr v. DeMusis*, 34 Bankr. 653, 656 (Bankr. D. Conn. 1983), *aff'd*, 40 Bankr. 1007 (D. Conn. 1984); *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 441-42 & n.11 (Bankr. D. Utah 1982). Other courts compare the full fair market value of the property to the sale price. See *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203 (5th Cir. 1980); *Federal Nat'l Mortgage Ass'n v. Wheeler*, 34 Bankr. 818, 821 (Bankr. N.D. Ala. 1983); *Perdido Bay Country Club Estates, Inc. v. Equitable Trust Co.*, 23 Bankr. 36, 39-40 (Bankr. S.D. Fla. 1982); *Cooper v. Smith*, 24 Bankr. 19, 23 (Bankr. W.D.N.C. 1982); *Home Life Ins. Co. v. Jones*, 20 Bankr. 988, 993-94 (Bankr. E.D. Pa. 1982); *Wickham v. United Am. Bank (In re Thompson)*, 18 Bankr. 67, 70 (Bankr. E.D. Tenn. 1982). A third approach is to compare the sale price to the fair market value less all liens including the one being foreclosed upon. See *In re Marble*, 40 Bankr. 751, 752-53 (Bankr. W.D. Tex. 1984); *Rosner v. Worcester*, 28 Bankr. 910, 914 (Bankr. C.D. Cal. 1983); *Coleman v. Home Sav. Ass'n*, 21 Bankr. 832, 834 (Bankr. S.D. Tex. 1982). A fourth approach is to compare the sale price plus the value of the lien being foreclosed upon with the fair market value on the sale date. This calculation is used only when the mortgagee is the purchaser because the value of the lien added to the sale price represents value given by the mortgagee in the form of satisfaction of an antecedent debt. See *New Yorktown Assocs. v. Pierce, Urstadt, Mayer & Greer, Inc.*, 40 Bankr. 701, 706-07 (Bankr. E.D. Pa. 1984); *Madrid v. Del Mar Commerce Co.*, 10 Bankr. 795, 797-98, 800 (Bankr. D. Nev. 1981), *rev'd sub nom. Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424 (Bankr. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 105 S. Ct. 125 (1984). Only two courts have expressly recognized these various calculations. See *Frank v. Berlin*, 39 Bankr. 166, 176-77 (Bankr. E.D.N.Y. 1984) (employing all methods); *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 441 n.11 (Bankr. D. Utah 1982) (adopting only the calculation that compares the sale price to the fair market value less post-sale liens).



of the parties,<sup>151</sup> and the marketability of the property transferred.<sup>152</sup>

In addition to these, courts should also consider several factors that stem from policy considerations underlying the Bankruptcy Code.<sup>153</sup> One factor is whether the foreclosure sale was judicial or nonjudicial.<sup>154</sup> A nonjudicial sale should be viewed with stricter scrutiny because there is a greater probability that reasonably equivalent value has not been received if the court does not supervise the sale.<sup>155</sup> A second factor is whether the foreclosure sale would have produced a surplus above the amount needed to satisfy the mortgagee's lien on the property, plus costs and expenses of the action, had the property been sold at fair market value. If the value of the property is greater than the mortgagee's lien and the purchase price is less than the fair market value, the purchaser has received the residual value of the debtor's equity of redemption,<sup>156</sup> which should be distributed among the creditors according to the policy of the Bankruptcy Code.<sup>157</sup> A third factor is whether the purchaser at the foreclosure sale is a third party or the mortgagee.<sup>158</sup> Courts should scrutinize the sale more strictly when the mortgagee is the purchaser<sup>159</sup> because the mortgagee may be forced to bid to protect its interest and has no incentive to bid a fair price.<sup>160</sup> A purchase by a third party is evidence of a regularly conducted sale and a fair purchase price.<sup>161</sup> Another factor is whether there was competitive bidding at the foreclosure sale.<sup>162</sup> The existence of competitive bidding would tend to indicate that reasonably equivalent value has been received.<sup>163</sup> Finally, courts should determine whether the purchaser at the foreclosure sale has resold the property at a profit.<sup>164</sup> To determine whether a profitable resale indicates

---

151. See *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 448 (Bankr. D. Utah 1982); cf. *Cook*, *supra* note 16, at 278 (stating factors a court should consider in determining fair consideration under § 3 of the UFGA).

152. See *supra* note 151.

153. See *Gillman v. Preston Family Inv. Co. (In re Richardson)*, 23 Bankr. 434, 447 (Bankr. D. Utah 1982).

154. See *Alden, Gross & Borowitz*, *supra* note 17, at 1621-23; *Answer to the Durrett Problem*, *supra* note 3, at 228-34. For a comparison of judicial and nonjudicial foreclosure sales, see *supra* note 11.

155. See *Alden, Gross & Borowitz*, *supra* note 17, at 1621-23; *Answer to the Durrett Problem*, *supra* note 3, at 228-34.

156. See *G. Osborne, G. Nelson & D. Whitman*, *supra* note 9, § 8.12, at 558.

157. See *supra* note 68 and accompanying text.

158. See *Alden, Gross & Borowitz*, *supra* note 17, at 1617-20; cf. *Washburn*, *supra* note 10, at 888-89 (whether mortgagee is the purchaser is a factor state courts consider in determining whether to vacate a foreclosure sale).

159. See *Alden, Gross & Borowitz*, *supra* note 17, at 1617-20; cf. *Washburn*, *supra* note 10, at 888-89 (purchase by a stranger indicates a fair purchase price).

160. See *supra* notes 64-66 and accompanying text.

161. See *Washburn*, *supra* note 10, at 888.

162. Cf. *id.* at 888-89 (competitive bidding is a factor state courts consider in determining whether to vacate a foreclosure sale).

163. Cf. *id.* (competitive bidding indicates that a foreclosure proceeding has been conducted fairly).

164. Cf. *id.* at 889-90 (whether mortgagee sells at a profit is a factor state courts consider in determining whether to vacate a foreclosure sale).

that less than reasonably equivalent value has been received at the foreclosure sale, a court should view the length of the purchaser's holding period before resale, physical improvements and other investments made prior to resale, and increases in the market value of the property.<sup>165</sup>

### CONCLUSION

Noncollusive foreclosure sales are subject to avoidance as fraudulent transfers under section 548(a)(2) of the Bankruptcy Code. A transfer of the debtor's possessory and equity interests occurs at some time during state foreclosure proceedings. If the transfer has occurred within one year prior to the filing of the bankruptcy petition and the debtor is insolvent on the transfer date or has been rendered insolvent by the transfer, the transfer can be avoided if reasonably equivalent value has not been received by the debtor. The most appropriate approach to measuring reasonably equivalent value in foreclosure sales is a case-by-case analysis. It is this approach that is most consistent with the language of section 548(a)(2) and the policy underlying the Code.

In addition, section 548(d)(1), which determines the time at which a transfer occurs for purposes of section 548(a)(2), can serve only to move the transfer date forward in time. Courts err when they interpret this section as moving the transfer date back in time to the date on which the mortgagee's security interest was perfected. The purpose of section 548(d)(1) is to subject unperfected transfers to avoidance and not to prevent the avoidance of transfers which may or may not be perfected.

It is unlikely, however, that courts will reach a consensus on these issues without a Supreme Court decision or additional bankruptcy amendments. The Supreme Court probably will continue to deny petitions of certiorari due to the many policy concerns involved, the fact that the legislature did not have the opportunity to hold hearings on the matter before the 1984 bankruptcy amendments were passed, and the ambiguities in the legislative intent underlying the 1984 amendments.

The ultimate resolution rests with the legislature. Unfortunately, it is doubtful, in light of the recent passage of the 1984 amendments, that Congress will review the Bankruptcy Code in the near future, unless persuaded to do so by lobbyists. Should Congress decide that the policy concerns are significant, it may abrogate the holding of *Durrett* or set forth standards under which noncollusive foreclosure sales are to be scrutinized under section 548(a)(2). In the interim, courts should not base their decisions on policy considerations, many of which have been exaggerated, but must interpret the language of section 548(a)(2) in light of the goals of the Bankruptcy Code.

*Darcy Lopez*

---

165. Cf. *id.* at 890 (resale price alone does not measure the propriety of a foreclosure sale).

